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circumstances which would have entitled the original mortgagee, on the date of the sub-mortgage, to claim such relief.

The second and the only remaining question for decision is, whether the discharge, set up on behalf of the third defendant, is true. I agree with the Lower Court that the evidence, called in support of the plea, is unsatisfactory and unreliable. Nor do I see any reason for discrediting the statement of the first defendant that no portion of the debt due to him was liquidated by the collections made by him from the tenants of two out of the eight mortgaged villages, under the power of attorney, exhibit II, dated 9th August 1886, and that when the said power was revoked, a few months afterwards by exhibit F, he accounted to the third defendant's father-in-law, with that defendant's knowledge, for the comparatively small amount that had been collected by him under the power. The decree of the Lower Court is in my view right. I would confirm it and dismiss the appeal with costs. The appellant will also pay the costs of the second defendant who was unnecessarily brought in.

DAVIES, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

1896. November 3, 5, 24.

PARVATHI AMMAL (PLAINTIFF), APPELLANT,

v.

SAMINATHA GURUKAL AND OTHERS (DEFENDANT), RESPONDENTS.*

Limitation Act—Act XV of 1877, sched. II, art. 118—Suit for possession by Hindu widow as heiress—Defendant in possession under an alleged adoption—Limitation.

A Hindu died in 1884, leaving the plaintiff, his widow, and certain landed and other properties. The defendant claimed, to the knowledge of the plaintiff in 1885, to have been adopted by the deceased, and from that date he had claimed as an adopted son to be entitled to the estate of which the plaintiff never enjoyed

* Appeal No. 88 of 1895.

possession. She now sued in 1893 for possession with mesne profits alleging in the plaint that the adoption had been falsely set up, but seeking no declaration with regard to it:

Held, that the suit was barred by limitation.

APPEAL against the decree of E. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in original suit No. 27 of 1893.

The plaintiff was the widow of one Soma Gurukal who died in January 1884. She averred that he left no heirs other than herself and that on his death she entered into possession and remained in enjoyment for some years of the property forming his estate. The plaint further stated that the first defendant falsely claiming to be the adopted son of the deceased disturbed her enjoyment, in consequence of which she brought a declaratory suit in 1890, which was dismissed on the ground that it was not maintainable for the reason that it was not shown that the lands were then in her possession.

Paragraph 5 of the plaint was as follows: "During the pend-"ency of the said suit and subsequently, the first defendant and "the other defendants who claim right through him entered upon "and usurped the lands from the year 1891."

It was alleged that the cause of action arose in February 1891 and the prayer of the plaint was for possession of the specified properties with mesne profits and for such other reliefs, which to the Court might seem proper. The first defendant pleaded that he was adopted by the deceased on 15th August 1877, from which date he lived with him until his death and that since that event he had been in enjoyment of the property.

The Subordinate Judge held that the alleged adoption was established by the evidence. On the second and third issues which raised the questions as to whether the suit was maintainable as framed, seeing that there was no prayer that the adoption be set aside and whether it was barred by Limitation, the Subordinate Judge expressed an opinion on the first in favour of plaintiff and on the second in favour of the defendant. His judgment on this part of the case was as follows:—

"I am not prepared to say that the suit is unsustainable, "because the plaintiff has not expressly sought to have the first "defendant's alleged adoption declared untrue. The omission to "ask for such a relief is certainly not accidental but intentional. "A suit for a declaration that an alleged adoption had never taken

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"place, should be brought within six years from the time when the "party suing and entitled to sue for it came to know the alleged "adoption under article 118 of schedule 2 of Act XV of 1877. "As the plaintiff in this case had known that the first defendant "was set up as an adopted son soon after her husband died in "January 1884, her advisers must have known that an express "claim for such a declaration would be at once met and that "successfully by the plea of limitation; and they have accordingly "omitted it. But it seems to me upon the latest authorities that, "whether she prayed for it or not, the framing of the plaint can "give her no advantage. In the case of *Jagadamba Chaodhrani* v. "*Dakhina Mohun Roy Chaodhri*(1) decided by the Privy Council, "'it was settled that a suit to set aside an adoption within the "'meaning of these words in the Limitation Act need not be a "'suit having declaratory conclusions, but that any suit in which "'the decree prayed for involves the decision of the question of "'the validity of an adoption set up in defence a suit to set aside "'an adoption.' These remarks were emphasised again by their "Lordships in the more recent case of *Mohesh Narain Munshi* v. "*Taruck Nath Moitra*(2). In the case then for consideration, there "was, like the present one, no prayer for a declaration that the "defendant's adoption was invalid or never took place, and their "Lordships held that that suit was, in substance, a suit 'to set aside "'an adoption' within the meaning of Article 129 of Act IX of "1871, the Act of Limitation which preceded Act XV of 1877, and "which applied to the circumstances of that case. Their Lord-"ships observed in the first case quoted above that the Legisla-"ture, having deemed fit to allow 'only a moderate time within "'which such delicate and intricate questions as those involved in "'adoptions shall be brought into dispute, it should strike alike at "'all suits in which the plaintiff cannot possibly succeed without "'displacing an apparent adoption by virtue of which the defend-"'ant is in possession.'

"The plaintiff's vakil in the present case adopted the contention "of the learned counsel for the plaintiffs in *Jagadamba Chaodh-"rani* v. *Dakhina Mohun Roy Chaodhri*(1) that she was suing not "to set aside any adoption, but to recover possession on her *primâ "facie* title as heir to the deceased, that it was the defendant who "alleged his adoption and that, on his failure to prove it, it need

(1) I.L.R., 13 Calc., 308. (2) I.L.R., 20 Calc., 487

"not be set aside, but taken as never having existed; and relied "on among other authorities *Basdeo* v. *Gopal*(1), *Ganga Sahai* v. "*Lekhraj Singh*(2) and *Sundaram* v. *Sithammal*(3). The answer "given by their Lordships to that argument which they character- "ised as 'ingenious' was 'that the defendants are in possession "'in the character of adopted sons; the *primâ facie* title is with "'them and until that is displaced they ought to retain their "'possession' (see *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy* "*Chaodhri*(4)). The same answer should be given in answer to "the plaintiff's contention. If the plaintiff by reason of her laches "failed to have the defendant's title in virtue of an adoption de- "clared untrue or invalid, within the time allowed by law, which "in the present case is six years from when the fact was known to "her, she cannot afterwards sue to deprive the defendant of the "possession he has.

"The last Allahabad case, though on all fours with the case "now under consideration, is no binding authority against the two "rulings of the Privy Council already quoted: and following the "same I find that the second issue should be decided in plaintiff's "favour and on the third issue that the suit is barred by the six "years' rule of Article 118."

In the result the Subordinate Judge dismissed the suit.

The plaintiff preferred this appeal.

Narayana Rau and *Sundara Ayyar* for appellant.

Bhashyam Ayyangar, *Desikachariar*, *Jivaji Rau* and *Kuppusami Ayyar* for respondents.

SHEPHARD, J.—There is no doubt that the plaintiff knew of the first defendant's adoption as long ago as in 1885, that is more than six years before the institution of the present suit. The Subordinate Judge finds that since the death of Swarna Gurukal, the adoptive father, the defendant has been in possession, though for a time after his father's death his possession was disturbed. In 1890, a suit was brought by the plaintiff, alleging that she had all along, since her husband's death, been in possession of all his property. It was found in that suit that the plaintiff was not and never had been in possession of the property. It was necessary for the Judge to find whether the plaintiff was in possession at the

(1) I.L.R., 8 All., 644.
(2) I.L.R., 9 All., 253, 267.
(3) I.L.R., 16 Mad., 311.
(4) I.L.R., 13 Calc., 318.

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date of that suit, because she asked for a declaration of her title. It having been found that she was not in possession, the suit was dismissed on the 28th February 1891. In her present plaint, she alleges that she was dispossessed in that very same month. No attempt is made to prove this allegation, which in itself is most improbable, but it is suggested that the evidence shows that the plaintiff was in possession before 1890 and that it is open to her, notwithstanding the decree in the suit of 1890, to establish that possession. It is argued that, if she was in possession between 1884 and 1890, there was no occasion for her to challenge the first defendant's adoption and therefore article 118 cannot properly be applied. Whatever weight may be due to this argument in a case in which the plaintiff can show an undisturbed possession in defiance of the alleged claim by adoption, the point does not really arise in the present case, because it is clear that the plaintiff's possession was at the best an interrupted and incomplete possession. The evidence seems to show rather that there was a constant struggle for possession on her part than that she was in actual enjoyment.

Holding, then, that the plaintiff is seeking to recover property of which she, since her husband's death, has not been in possession, and which has been all along claimed by the defendant in virtue of his alleged adoption, we have to consider whether the suit is barred by limitation. On the facts stated, it unquestionably would be barred, if the Act of 1871 still remained in force, for it has been decided by the Judicial Committee with reference to Article 129 in the schedule of that Act that a plaintiff, whose claim is met by the assertion of an adoption and cannot be made good without negativing the adoption, must bring this suit within the time fixed in that article. It is contended that the ruling of the Judicial Committee is not applicable to cases governed by the existing Act, or, in other words, that the law as it stood under the earlier Act has been altered by the passing of the Act of 1877.

Comparison between Article 129 in the schedule of the repealed Act and Article 118 of the Act of 1877 shows that an alteration of the language has been effected in all three columns. The period has been reduced from twelve years to six; the starting point has been altered by substituting the date when the plaintiff knows of the adoption for the date of the adoption; the description of the suit has been altered. This last alteration is the only

one material to the present question, for it cannot be suggested that the other alterations affect the applicability of the article. To support the plaintiff's contention, it is necessary to show that the change in the language descriptive of the suit points to a change of policy on the part of the legislature and to the intention to restrict the application of the article to suits in which a mere declaration is sought for. Unfortunately for this contention, we know the reason for the change of language and can, therefore, account for it fully without ascribing any change of policy to the legislature. It is plain, as is pointed out by the Judicial Committee in *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri*(1), and it also seems to have been pointed out before 1877, that the phrase "a suit to set aside an adoption" is an inaccurate one. Hence the substitution in the 118th article of the expression—"suit to obtain a declaration that an alleged adoption is invalid or never took place." I am at a loss to understand how this substitution, which is in accordance with the observations of the Judicial Committee, though not consequent upon them, can be taken to effect a change of law in favour of the plaintiff. The observations of the Judicial Committee apply to the suit of a person in the present plaintiff's position, whether it is incorrectly called a suit to set aside an adoption or correctly called a suit to declare an adoption invalid. In *Mohesh Narain Munshi* v. *Taruck Nath Moitra*(2), there is a strong *dictum* to the effect that the plaintiff's position has not been altered for the better by the change of expression and in a later case, it appears to have been assumed that, notwithstanding the change, a plaintiff suing for possession must bring his suit within six years of his knowledge of the defendants' adoption. (*Lachman Lal Chowdhri* v. *Kanhay Lal Mowar*(3)). A string of cases was cited in which a different view of the law has been taken by other High Courts. I do not find in the judgments in those cases any sufficient reason given for attributing to the legislature an intention, which in itself is most improbable, when it is remembered that before the Act of 1871 was repealed, the interpretation put by the Judicial Committee on Article 129 had not been enunciated.

An argument is founded on the fact that the language descriptive of the suit has not been changed in Article 91 corresponding

(1) I.L.R., 13 Calc., 318. (2) I.L.R., 20 Calc., 494. (3) I.L.R., 22 Calc., 609.

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to Article 92 of the Act of 1871. (*Natthu Singh* v. *Gulab Singh*(1). The reason for this is plain. The phrase "suit to "cancel or set aside an instrument" is not an inaccurate one, and therefore there was no need to alter the language in the new Act. If it had been the object of the legislature to place parties challenging or maintaining an adoption in a position more favourable than that assigned to them by the Act of 1871, as interpreted by the Judicial Committee, the simplest course would have been to repeal Article 129 and leave declaratory suits, relating to adoption to be governed by the general article. The preservation of the special provision for suits in which such questions are raised, shows that the policy which actuated the legislature in 1871, was still maintained in 1877. The reduction of the period from twelve years to six in cases in which the plaintiff has from the first knowledge of the alleged adoption or of the fact that the adoption is denied, points to the desire to restrict, as far as possible, the time within which such questions may be raised. There was no need for the abbreviation of the period or indeed for the retention of any special article, if it was intended to apply only in cases in which the plaintiff seeks a declaration and nothing more.

For these reasons, I am of opinion that the law has not been altered so as to make article 118 inapplicable to the present suit and that, therefore, in the circumstances above stated, the suit is barred by the law of limitation.

DAVIES, J.—I concur in the conclusion of my learned colleague, as it appears clear, for the reasons stated by him, that the plain ruling of their Lordships of the Privy Council has not been in any way affected by the mere change in the wording as to the character of the suit in the new article. It has been urged, however, that the effect of that ruling may not have been foreseen and that it may lead to unnecessary litigation on the one hand or to a denial of justice on the other.

The case is put for instance that supposing the widow here had been in actual possession, there was no occasion for her to sue until she was ousted, and yet if that ouster had taken place more than six years after the adoption became known to her, she would not, under the present ruling, have been able to contest it. This result, it is contended, involved either her bringing a suit at a time

(6) I.L.R., 17 All., 167.

when none was necessary, or the hardship that when it did become necessary, it was not allowed.

But the obvious answer to the first part of the argument is that it was not unnecessary for her to sue, for it was necessary for the purpose of completing her title, which, so long as the adoption stood in the way, was a bad one. And the answer to the second part of the argument is that the widow would be in no worse a position than the adopted son, for, if her six years' possession had begun with a denial of his adoption, he would, after the lapse of that time, be equally debarred under the next article (119) from suing to establish it.

Another case put is that of a reversioner, say a brother, entitled to inherit his divided brother's estate but for an adoption made by the latter. Supposing that adoption to have been made six years before his death, is the brother, it is asked, bound to sue to declare the adoption invalid before his right to inherit accrues, and when if he should happen to predecease his brother, it would never accrue. The answer must be in the affirmative and not unreasonably, for although the litigation may, in a case here and there, turn out to have been in vain, that disadvantage is small compared with the advantage to the community generally in the security of titles, if they are not challenged within a reasonable time. The principle has always been the same. The only difference now is that the time for impeaching an adoption has been changed from twelve years from the date of it absolutely, to six years from the time that it became known to the party ready to dispute it. This is indeed a more favourable starting point for him than the old one.

The only case that could arise of a supposed denial of justice might be the case of a remote reversioner suddenly finding himself in the position of next reversioner but too late to sue. It could be answered to him that it was owing to his want of due diligence to safeguard his rights, while there was yet time.

It is pointed out that to no other status than that of adoption is this six years' rule applicable. That seems to be so, but it is open to the Legislature, I presume, to extend the provision to the cases of marriage and legitimacy, if it so pleased.

The appeal is accordingly dismissed with costs.